IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

## No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, et al.,
*Petitioners,*

VS.

SIERRA CLUB, et al.

## No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, et al.,
*Petitioners,*

VS.

SIERRA CLUB, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

# BRIEF OF 22 NAMED STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## Table of Contents

## Table of Authorities Cited

### Cases

**Regulations**

## Statutes and Administrative Orders







## Texts

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### INTEREST OF AMICI CURIAE

The interest of the States upon whose behalf this brief is submitted is not in the merits or demerits of coal development in the Northern Great Plains. Amici states are vitally interested in the Court's disposition

of the substantive issue—interpreting the National Environmental Policy Act (NEPA). The states are interested in NEPA for two reasons:

1. NEPA provides the primary means by which the States can be informed about and can affect what the Federal Government is doing to the environment of the States.

2. Approximately half the States have laws or administrative regulations patterned on NEPA. This Court's construction of the Federal law will affect the construction of the State laws patterned upon it.

These interests are more extensively described in the body of the argument.

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## SUMMARY OF ARGUMENT

The National Environmental Policy Act provides the primary means by which the States can be informed about and can affect what the Federal Government is doing to the environment of the States. Amici States respectfully pray that the decision of this Court recognize the importance to States of the environmental impact statement created by Congress in NEPA. They further wish to emphasize the importance of the "program environmental impact statement," a conspicuous example of which is the subject of this case. It is through this beneficial tool that States can become informed about the cumulative effect of massive Federal actions within the States, enabling the States to participate effectively in the



commenting and decision-making process concerning what the Federal Government is doing to the environment of the States.

In addition, approximately half of the States have laws or administrative regulations patterned on NEPA. This Court's construction of the Federal law will affect the construction of the State laws patterned on it.

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## ARGUMENT

### I.

### NEPA PROVIDES THE PRIMARY MEANS BY WHICH THE STATES CAN BE INFORMED ABOUT AND AFFECT WHAT THE FEDERAL GOVERNMENT IS DOING TO THE ENVIRONMENT OF THE STATES.

#### A. The National Environmental Policy Act.

The National Environmental Policy Act contemplates a major State role in its implementation. 42 U.S.C. 4321-4347. "[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . 42 U.S.C. 4331(A)."[1] This policy, in

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[1]NEPA supplements existing agency authority with respect to the national environmental policy. In the words of the Council on Environmental Quality's Guidelines (discussed, *infra*, at paragraph I. D.):

"Section 102(2)(C) of the Act applies to all agencies of the Federal Government. Section 102 of the Act provides that to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and section 105 of the Act provides that the policies

which States are to cooperate, is implemented by various "action forcing" devices, chief among which is the "environmental impact statement" mandated by section 102(2)(C) (42 U.S.C. 4332(2)(C)). President's Council on Environmental Quality, *Environmental Quality—Third Annual Report,* 222-228 (1972); See *Calvert Cliffs v. A.E.C.,* 449 F.2d 1109, 1113 (D.C. Cir. 1971); *Greene County v. F.P.C.,* 455 F.2d 412, 415 (2d Cir. 1972) cert. den. 409 U.S. 849 (1972); *E.D.F. v. Corps of Engineers,* 470 F.2d 289, 294, n.8 (8th Cir. 1972). The environmental impact statement must be circulated to "State . . . agencies, which are authorized to develop and enforce environmental standards" for their "comments and views" which must then "accompany the proposal through the existing agency review processes." 42 U.S.C. 4332(2)(C). NEPA contemplates Federal-State cooperation in the preparation of certain kinds of environmental impact statements. 42 U.S.C. 4332 (2)(D). "[A]ll agencies of the Federal Government" are required by the Act to "make available to States . . . advice and information useful in restoring, main-

and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal Agencies. This means that each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. In accordance with this purpose, agencies should continue to review their policies, procedures, and regulations and to revise them as necessary to ensure full compliance with the purposes and provisions of the Act. The phrase 'to the fullest extent possible' in section 102 is meant to make clear that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. 1500.4 (a).



taining, and enhancing the quality of the environment . . . ." 42 U.S.C. 4332(2)(G). The President is charged with reporting annually to the Congress on, inter alia, "a review of the programs and activities . . . of . . . State . . . governments . . . with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources . . . ." 42 U.S.C. 4341. The agency created by and given primary responsibility for implementing NEPA, the Council on Environmental Quality (CEQ) is directed to consult with State governments. 42 U.S.C. 4345(1).

**B. The Environmental Quality Improvement Act.**

Several months after the enactment of NEPA the Congress passed the Environmental Quality Improvement Act of 1970. 42 U.S.C. 4371-4374. That Act did two things. It declared the existence of a "national policy for the environment" (42 U.S.C. 4371)[2] and it provided administrative support for the Council on Environmental Quality (42 U.S.C. 4372). It is the first of those purposes that concerns us here, for the Congress has placed "primary responsibility" for implementing the "national policy" on the States and their political subdivisions:

> "(b)(1) *The Congress declares that there is a national policy for the environment* which provides for the enhancement of environmental quality. This policy is evidenced by statutes

[2]See *Citizens to Preserve Overton Park, Inc., et al., v. Volpe,* 401 U.S. 402, 404, (1971); *E.D.F. v. T.V.A.,* 468 F.2d 1164, 1173-1174 (6th Cir. 1972); *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).

heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic development.

"(2) *The primary responsibility for implementing this policy rests with State and local governments.*" 42 U.S.C. 4371. [Emphasis added.]

**C. The President's Executive Order.**

The Executive Order of the President which implements NEPA further stresses the role of the States. Executive Order No. 11514, 3 C.F.R. 271, see 42 U.S.C. 4321 (1970).[3] Heads of Federal agencies are mandated to consult with appropriate State agencies in "carrying out their activities as they affect the quality of the environment." *Id.*, §2(a). Federal agencies are to encourage State agencies to inform the public concerning their activities affecting the quality of the environment. *Id.*, §2(b). Various kinds of information regarding "existing or potential environment problems" are to be made available to States. *Id.*, §2(c).

**D. The Council on Environmental Quality's Guidelines.**

CEQ's Guidelines, appearing in the Code of Federal Regulations, reinforce the States' role. 40 C.F.R. Part 1500. Those Guidelines are entitled to deference. See *Warm Springs Dam Task Force v. Gribble*, 417

[3]It is the Executive Order which charges the Council on Environmental Quality with issuing guidelines to all Federal agencies to implement the environmental impact statement process. The CEQ shall: "Issue guidelines to Federal Agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." *Id.*, §3(h).



U.S. 1301, 1304-1310 (Douglas, Cir. J.); *N.R.D.C. v. Callaway*, 524 F.2d 79, 86 (2d Cir. 1975); *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079, 1092-1093 (D.C. Cir. 1973); *Greene County v. F.P.C., supra*, 455 F.2d 412, 421 (2d Cir. 1972); *E.D.F. v. T.V.A.*, 468 F.2d 1164, 1178 (6th Cir. 1972). The Guidelines are addressed to State as well as Federal participants in the process. 40 C.F.R. 1500.1(a). State agencies are to be consulted by Federal agencies in the assessment of the "potential environmental impact" of Federal actions. 40 C.F.R. 1500.2. Indeed where Federal agencies lack the relevant expertise, they are encouraged to make appropriate use of State Agencies. 40 C.F.R. 1500.8(c). Draft environmental impact statements are to be circulated to State agencies. 40 C.F.R. 1500.2(b)(1). Those State agency comments are then to be considered by the Federal agencies. 40 C.F.R. 1500.2(b)(2); see 1500.7(a). The Federal agencies' final environmental impact statements are then to be "responsive to the comments received." 40 C.F.R. 1500.2(b)(3); see 40 C.F.R. 1500.10.

The Council specifies the procedures for the Federal-State cooperation. 40 C.F.R. 1500.3(a) and (c). More specifically, the Guidelines emphasize the importance of opportunity for early State (and other) reviewers' comments so as meaningfully to shape the ultimate decision. "It is important that draft environmental statements be prepared and circulated for comment . . . as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful con-

sideration to the environmental issues involved." 40 C.F.R. 1500.7(a).[4]

In considering whether to hold a public hearing Federal agencies are directed to consider the "degree of interest" as evidenced by requests for a public hearing from, among others, State authorities. 40 C.F.R. 1500.7(d).

The environmental impact statement must address the relationship of the proposed Federal action to

[4]The entire subdivision of the section reads:

"(a) Each environmental impact statement shall be prepared and circulated in draft form for comment in accordance with the provisions of these guidelines. The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by section 102(2)(C). (Where an agency has an established practice of declining to favor an alternative until public comments on a proposed action have been received, the draft environmental statement may indicate that two or more alternatives are under consideration.) Comments received shall be carefully evaluated and considered in the decision process. A final statement with substantive comments attached shall then be issued and circulated in accordance with applicable provisions of §§1500.10, 1500.11, or 1500.12. It is important that draft environmental statements be prepared and circulated for comment and furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process. For major categories of agency action, this point should be identified in the procedures issued pursuant to §1500.3(a) For major categories of projects involving an applicant and identified pursuant to §1500.6(c)(ii) as normally requiring the preparation of a statement, agencies should include in their procedures provisions limiting actions which an applicant is permitted to take prior to completion and review of the final statement with respect to his application." 40 C.F.R. 1500.7(a).



"land use plans, policies, and controls for the affected area." 40 C.F.R. 1500.8(a)(2). "This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approved or proposed Federal, State, and local land use plans, policies, and controls . . . for the area affected . . . ." *Ibid.* Where a "conflict or inconsistency" is shown, the EIS is to describe "the extent to which the agency has reconciled its proposed action with the plan, policy or control" and the "reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation." *Ibid.*

The Guidelines further provide the mechanism for State review of proposed Federal actions which may significantly affect the environment. 40 C.F.R. 1500.9(c); 40 C.F.R. Part 1500, Appendix IV; see 40 C.F.R. 1500.9(a). Basically the Office of Management and Budget Circular No. A-95 provide for using a series of State and areawide clearing houses ("A-95 review") to secure State and local views "which can assist in the preparation and review of environmental impact statements." 40 C.F.R. 1500.9(c); see 40 C.F.R. 1500.11(d). These procedures are described in detail in the joint OMB-CEQ memorandum attached to the Guidelines. 40 C.F.R. Part 1500, Appendix IV; see 40 C.F.R. 1500.9(c). The responsibilities of commenting agencies are also outlined. 40 C.F.R. 1500.9(e).

At the conclusion of the process the final environmental impact statement must respond to the comments that have been made (including State com-

ments). 40 C.F.R. 1500.2(b); 40 C.F.R. 1500.10(a). Copies of the final statement must then be sent to State agencies which made substantive comments on the draft statement. 40 C.F.R. 1500.10(b). Appropriate time limits are established to insure that in fact the opportunity for State (and other) input exists. 40 C.F.R. 1500.11(b).

In brief, Congress (1) has established a national policy for the environment; (2) has declared that primary responsibility for implementing that policy lies with States and their political subdivisions; (3) has provided the means (the environmental impact statement) for the States to assume that responsibility insofar as major Federal actions affect it; and (4) procedures have been established to facilitate that State role from the earliest part of the process until its ultimate implementation.

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## II.

### THE IMPACT OF POTENTIAL FEDERAL PROGRAMS ON A STATE IS IMMENSE

The potential for Federal impact within a State is immense. The impact may or may not be desirable. If adverse, its severity may or may not be offset by competing national priorities. But the potential for impact is immense. One need only examine the record in this case to become aware of the pervasive effect in the directly affected States of a massive



Federal effort to develop coal.[5] Similar potential for colossal impact in a geographic area is not uncommon in the development of resources. Off-shore oil drilling affects coastal areas in a comprehensive manner. Oil shale, coal gasification, the development and movement of petroleum and natural gas—all of these may affect and alter in a major way the areas where the development occurs. Such pervasive development may be the most significant determinant of how people in the affected areas live. The change occasioned by massive development in an area may represent a greater impact on the lives of the affected citizens

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[5]The Council on Environmental Quality in its Sixth Annual Report suggests what may be some of the potential effects:

"NORTHERN GREAT PLAINS COAL

"A recent report, *Effects of Coal Development in the Northern Great Plains*, issued by the Northern Great Plains Resources Program, [footnote omitted] illustrates the regional nature of problems associated with coal development. The group concluded that secondary impacts—those resulting from the additional industrial and commercial development ancillary to the primary coal development projects—may well be the most significant impacts of developing the region's coal resources. Some other conclusions are:

". The population increases attributable to coal development will be large compared to existing local populations

". The rapid influx of population will increase demands for services

". Public service requirements will increase at a much faster rate than revenue collection, especially in the early years of development

". Three service areas are of particular concern—housing, health care, and education

". Many Indian reservations will be affected by coal development, for some reservations contain considerable coal deposits and some of these lands have been leased

". Coal development will accelerate the urbanization process that is occurring in the Northern Great Plains region." Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report. 1975) 136-137; also see 640-646.

than the changes caused by the totality of all previous governmental actions in the area.[6]

**A. How States Can Benefit From The Program EIS Process.**

How can the States benefit from the program environmental impact statement process? First, they can become informed—the simple process of insuring that they are aware of what the Federal Government has in store for them. Second, they can insure that the Federal Government is itself informed—that before taking major actions which either separately or cumulatively significantly affect the environment the Federal Government has adequately discussed the consequences of its action.[7] Problems are to be faced,

[6]By way of example of the sort of effects of concern to a State which are occasioned by cumulative Federal actions in one area of a State, we invite the Court's attention to a case in which the State of New York intervened as a party plaintiff:

> "In recognition of Congress' purpose the CEQ Guidelines for preparation of impact statements emphasize that consideration should be given not only to the action that is the subject of the EIS but also to 'related Federal actions and projects in the area, and *further actions contemplated*' [emphasis added], 40 C.F.R. §1500.6(a), and direct that the 'interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement,' 40 C.F.R. §1500.8(a). . . . The Navy's impact statement fails to meet this standard of comprehensive evaluation. It is clear that there are at least several other major federal and private dredging projects that are likely to produce colossal amounts of polluted spoil for disposal in this particular area of Long Island Sound. . . . The Navy's failure to consider these and possibly other proposed dredging projects in the New London area is an example of the isolated decisionmaking sought to be eliminated by NEPA." *N.R.D.C. v. Callaway*, 524 F.2d 79, 88-89 (2d Cir. 1975).

[7]A California Court interpreting a State equivalent of the EIS has termed it "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *County of Inyo v. Yorty*, 32 C.A.3d 795, 810, 108 Cal. Rptr. 377, 388 (Cal. Ct. of App. 1973).



not swept under the rug. *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *Russian Hill Improvement Ass'n v. Board*, 44 C.A.3d 158, 171, 118 Cal. Rptr. 490, 498 (Cal. Ct. of App. 1974); *People v. County of Kern*, 39 C.A.3d 830, 841, 115 Cal. Rptr. 67, 75 (Cal. Ct. of App. 1974). Third, the State may attempt to shape the Federal program,[8] using administrative and even political or judicial means. Once the facts are clear (see *City of Davis v. Coleman, supra*, 521 F.2d 661, 676 (9th Cir. 1975)), the constructive interplay of National and State Governments that characterizes our Federal system may take place. Fourth, the State may itself plan in light of the prospective development. A potential massive impact may trigger a need for massive changes in infrastructure—such as highways, water resources, sewers, schools. NEPA is our tool—the one Federal law so pervasive as to cover every major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C).

Again, the States which have signed this brief are not here asserting that proposed change is or is not desirable. They are not stating here that such development is or is not in the national interest. They are asking that the immensity of the Federal impact be recognized and that the States' tool for coping with it, the National Environmental Policy Act, not be construed in a manner which would deprive the States of a means for becoming informed about and par-

[8]A Washington Court has referred to the EIS requirement as "'an attempt by the people to shape their future environment by deliberation, not default'" *Byers v. Board*, 529 P.2d 823, 828 (Wash. S.C. 1974).

ticipating in the shaping of the programs that will affect them so massively.[9] This implies, at minimum, two interrelated considerations, those of timing and of scope. In the first case States, in order effectively to participate in the NEPA process, must be able to have a say in the process at a sufficiently early stage so as meaningfully to affect the decision, whether that

[9]States participate as a matter of course in the cooperative administrative efforts described in paragraph I. D. of this brief. Among the instances where States or their political subdivisions have felt compelled to seek judicial enforcement of the Congressional mandate are: (States.) *Alabama ex rel. Baxley v. Woody*, 473 F.2d 10 (5th Cir. 1973); *Alpine Lakes Protection Society and Washington v. Schlapfer*, 518 F.2d 1089 (9th Cir. 1975); *Arizona Public Service Co., and State of California v. Federal Power Com'n*, 490 F.2d 783 (D.C. Cir. 1974); *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974); *Louisiana v. Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Natural Resources Defense Council and State of New York v. Callaway*, 524 F.2d 79 (2d Cir. 1975); *Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235 (6th Cir. 1974); *Washington Utilities & Transp. Com'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975). *Alaska v. Kleppe*, 76-0368 (D.C.D.C.); *California, et al. v. Morton*, Civ. 74-2374-DWW (C.D. Cal.); *California v. Kleppe*, 75-1943 (D.C.D.C.); *Delaware v. Pa. N. Y. Cent. Trans. Co.*, 323 F. Supp. 487 (D. Del. 1971); *Illinois v. Butterfield*, 8 E.R.C. 1307 (N.D. Ill. 1975); *Izaak Walton League of America and State of Illinois v. Schlesinger*, 337 F. Supp. 287 (D. D.C. 1971); *New York v. Department of the Army*, 3 E.R.C. 1947 (S.D.N.Y. 1972); *Pennsylvania v. Morton*, 381 F. Supp. 293 (D. D.C. 1974); *Wisconsin v. Butz*, 389 F. Supp. 1065 (E.D. Wis. 1975); *Wisconsin v. Callaway*, 371 F. Supp. 807 (W.D. Wis. 1974). (Political Subdivisions.) *City of Boston v. Brinegar*, 512 F.2d 319 (1st Cir. 1975); *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Greene County Planning Board v. Federal Power Com'n*, 490 F.2d 256 (2d Cir. 1973); *Port of New York Authority v. United States*, 451 F.2d 783 (2d Cir. 1971); *Scenic Hudson Preservation Conference and City of New York v. F.P.C.*, 453 F.2d 463 (2d Cir. 1971); *Borough of Morrisville v. Delaware River Basin Com'n*, 382 F. Supp. 543 (E.D. Pa. 1974); *City of North Miami, Florida v. Train*, 377 F. Supp. 1264 (S.D. Fla. 1974); *City of Romulus v. County of Wayne*, 392 F. Supp. 578 (E.D. Mich. 1975); *Port of Astoria v. Hodel*, 8 E.R.C. 1156 (D. Ore. 1975); *Tierrasanta Community Council and City of San Diego v. Richardson*, 6 E.R.C. 1065 (S.D. Cal. 1973).



decision is made consciously or by incremental nibbles.[10] A role after decisions are already made ceases to be a vital one. The document then produced becomes a "*post hoc* rationalization." See *E.D.F. v. Coastside County Water District*, 27 C.A.3d 695, 706, 104 Cal. Rptr. 197, 203 (Cal. Ct. of App. 1972); also see *Citizens to Preserve Overton Park Inc., et al. v. Volpe, supra*, 401 U.S. 402, 419-420 (1971). Second, scope diminishes with time. A virtue of the program EIS is the opportunity it affords for the examination of basic policies and the explorations of major alternatives.[11] Given the potential consequences of major Federal actions to states, these interrelated questions of timing and of scope become vital.

**B. Significant Effect.**

The Council on Environmental Quality's Guidelines provide some hint of the potential pervasiveness of Federal action. Much may significantly affect the environment.

> "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed,[12] related Federal actions and

[10]See *Loveless v. Yantis*, 513 P.2d 1023, 1029 (Wash. S.C. 1973).

[11]In CEQ's words, "The EIS itself is intended to be, and often is, the tip of an iceberg, the visible evidence of an underlying planning and decisionmaking process that is usually unnoticed by the public." Council on Environmental Quality, *Environmental Quality, supra*, 628 (Sixth Annual Report. 1975).

[12]"NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration." *N.R.D.C. v. Callaway, supra*, 524 F.2d 79, 88 (2d Cir. 1975).

projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. . . ." 40 C.F.R. 1500.6(a).[13]

**C. Secondary Effects.**

Among the consequences of Federal action it is often the secondary or indirect consequences which

[13]A purpose of NEPA and of its State progeny "is to avoid the adverse impact upon the environment which takes place when various phases of a project, or series of projects, are authorized by governmental agencies in a piecemeal fashion without regard to the cumulative impact of the total development." *Juanita Bay Valley Com. Ass'n. v. City of Kirkland,* 510 P.2d 1140, 1149 (Wash. Ct. of App. 1973).



are the most pervasive.[14] As the CEQ Guidelines state:

> "(ii) Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infra-structure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be even more sub-

[14]As stated by the Ninth Circuit:

> "[T]he Council on Environmental Quality only recently pointed out, consideration of secondary impacts may often be more important than consideration of primary impacts. [Footnote omitted.]
>
> 'Impact statements usually analyze the initial or primary effects of a project, but they very often ignore the secondary or induced effects. A new highway located in a rural area may directly cause increased air pollution as a primary effect. But the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth. For many projects these secondary or induced effects may be more significant than the project's primary effects.
>
> • • • • • •
>
> 'While the analysis of secondary effects is often more difficult than defining the first-order physical effects, it is also indispensable. If impact statements are to be useful, they must address the major environmental problems likely to be created by a project. Statements that do not address themselves to these major problems are increasingly likely to be viewed as inadequate. As experience is gained in defining and understanding these secondary effects, new methodologies are likely to develop for forecasting them, and the usefulness of impact statements will increase.' *Fifth Annual Report of the Council on Environmental Quality,* 410-11 (December 1974)." *City of Davis v. Coleman,* 521 F.2d 661, 676-677 (9th Cir. 1975).

stantial than the primary effects of the original action itself. For example, the effects of the proposed action on population and growth may be among the more significant secondary effects. Such population and growth impacts should be estimated if expected to be significant (using data identified as indicated in §1500.8(a)(1) and an assessment made of the effect of any possible change in population patterns or growth upon the resource base, including land use, water, and public services, of the area in question." 40 C.F.R. 1500.8(a)(3)(ii).

**D. Program Environmental Impact Statements.**

Often it is not a single, discreet project that by itself significantly affects the environment, but the sum of various such projects. Therefore the CEQ has provided in its Guidelines that in

". . . many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area . . . or common to a series of agency actions . . . , or the overall impact of a large-scale program or chain of contemplated projects . . . ." 40 C.F.R. 1500.6 (d)(1).[15]

CEQ's guidelines are both sensible and sensitive.

[15]See Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report. 1975), *supra*, at 640-646.



## III.

## PROGRAM ENVIRONMENTAL IMPACT STATEMENTS ARE OF IMMENSE BENEFIT TO THE STATES AND NATION

**A. What Are Program Environmental Impact Statements?**

Program environmental impact statements are described in CEQ's Guidelines, excerpts from which were quoted immediately above:

"Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments). Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement." 40 C.F.R. 1500.6(d)(1).

Perhaps the most thoughtful explanation of what the program environmental impact statement has come to be is found in the work of the nation's leading authority on NEPA.[16] By way of background we quote extensively from Anderson:[17]

[16]F. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (1973); F. Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law*, 238-419 (E. Dolgin and T. Guilbert, ed. West Pub. Co. 1974).

[17]Also see Council on Environmental Quality, *Environmental Quality* (Sixth Annual Report. 1975), *supra*, at 640-646.

"c. Programs, Policy, and overview statements

"After legislation is passed, an agency should not wait until specific projects are formulated before preparing additional impact analyses. Between the passage of new legislation and the final phases of its implementation, the agency will set the policies it intends to pursue, will select substantive and geographic emphases, and will usually promulgate detailed guidelines. For its older continuing programs, the agency will also want from time to time to evaluate its basic operational criteria. All of these actions are important candidates for NEPA impact statements.

"In view of the emphasis in NEPA's legislative history upon advance planning and prevention of decision making in cumulatively destructive increments, [foonote omitted] it is not surprising that the legislative history also expressly states that 'regulations, policy statements, or expansion or revision of ongoing programs' [footnote omitted] must be covered by impact statements. The basic decisions made in the early phases of program design have a greater potential for environmental harm that any one separate project decision at a later time. A 'program,' 'umbrella,' or 'overview' impact statement affords an occasion for more comprehensive consideration from an environmental point of view of basic policies, programmatic alternatives, geographic variations, cumulative impacts, overall effects of large-scale programs, and chains of proposed projects that can realistically take place in a statement on an individual action. [Footnote omitted.]

"When a new program is just beginning, the obvious course is for the agency to prepare state-



ments as various phases of the program unfold. The Department of the Interior, for example, appears to be following this course with exploratory development of oil shale, [footnote omitted] the National Recreation Plan, [footnote omitted] and geothermal steam development. [Footnote omitted.] The court in *Scientists' Institute for Public Information* (SIPI) *v. Atomic Energy Commission* [footnote omitted] imposed such a program statement requirement upon the research and development phase of the AEC's Liquid-Metal Fast Breeder Reactor Program (LMFBR). In addition to the LMFBR program, statements have been prepared on the research and development program for keeping the St. Lawrence Seaway open longer during winter with icebreakers, heat additives, and bubblers, [footnote omitted] and upon the saltwater desalting program. [Footnote omitted.] Such preparation is consistent with the basic thrust of *Natural Resources Defense Council v. Morton.* [Footnote omitted.]

"Program statements may usefully focus upon geographic regions as well. For example, statements have been prepared for the development of the Souris Red River and Rainy River basins in Minnesota, North Dakota, and South Dakota, [footnote omitted] on the Upper Mississippi River Basin Study, [footnote omitted] on the central Arizona Project, [footnote omitted] and on underground nuclear testing centered in Nevada. [Footnote omitted.]

"A draft statement prepared by the Department of Housing and Urban Development illustrates how impact statement preparation or program guidelines may influence agency policy at an early time. [Footnote omitted.] HUD is

preparing 'Minimum Property Standards, for the design and construction of agency-funded housing. The standards involve a comprehensive revision of acceptable physical criteria as detailed in a guidance manual several hundred pages in length. In theory the draft statement affords early leverage on problems associated with transportation, energy and aesthetics as they affect HUD programs.

"Litigation has touched upon program statements. Besides SIPI and *Natural Resources Defense Council v. Morton,* the court in *Conservation Society of Southern Vermont v. Secretary of Transportation* rejected project-by-project, segment-by-segment NEPA treatment of the overall plan to upgrade interstate Route 7 through Connecticut, Massachusetts, and Vermont. [Footnote omitted.] Citing SIPI, the court called for an overview of the interconnected impacts of the entire project. In *Sierra Club v. Froehlke,* the court required an overall assessment of the entire multi-phased Trinity River development project, as well as separate treatment of its components, including the Wallisville Dam, unless it could be shown that the Wallisville Dam could be justified on its local merits alone. [Footnote omitted.] *Natural Resources Defense Council v. Tennessee Valley Authority* the court accepted the TVA's program statement on its strip mined coal contracts and held further (in a more doubtful decision) that individual statements did not have to be prepared on separate, specific contracts. [Footnote omitted.] Finally, in *Minnesota Public Interest Research Group v. Butz,* the court held that the cumulative effect of all Forest Service decisions on timber management in the Boundary



Waters Canoe Area (BWCA) was 'major Federal action' and that the Forest Service had to prepare an impact statement on its overall BWPCA timber management plan. [Footnote omitted.]

"The Boundary Waters Canoe Area case illustrates how ongoing actions may be subjected to programmatic review. Other cases have touched upon this aspect of program or 'overview' statements. In *Lee v. Resor* the court held that NEPA applied to a 20-year-old Corps' program which used herbicides to control water hyacinths growing in the St. Johns River in Florida. [Footnote omitted.] Although preliminary injunctive relief was denied, the court held that it had jurisdiction to order the statement prepared while the spraying continued. The court's interpretation of NEPA's legislative history and purposes convinced it that the Corps' guidelines requiring that impact statements be prepared on all of its continuing programs within three years correctly interpreted the law. The court concluded its analysis of NEPA's legislative history by stating:

> It would be ironic if Congress did not intend to affect those projects and agency decisions that provided the impetus for the Act. Congress doubtless intended that NEPA have some application to the type of situation presented here [footnote omitted]. [Footnote omitted.]

"Although the court in *Sierra Club v. Mason* [footnote omitted] found that the harbor dredging at issue in that case was a new major federal action with 'a life of its own' which began after NEPA's enactment, in dictum the court affirmed that NEPA was intended to apply to such a con-

tinuing agency program. The court apparently was not content to accept the Corps' designation of the project as ongoing maintenance, which would have required the Corps under its own guidelines to prepare a statement within three years of NEPA's enactment. The court viewed the guidelines as creating a temporary exception to NEPA's blanket applicability and refused to allow the project at issue to fall within it.

"In *New York v. Department of the Army,* a longstanding Corps program to dump sewage sludge and dredged spoil in the New York harbor area was challenged for lack of an impact statement. The Corps usually gathered the material to be dumped, but issued permits to private barge owners to dump it in Corps-designated areas. During litigation the Corps conceded NEPA's applicability by preparing an impact statement on the program. [Footnote omitted.]

"The numerous instances of program statements cited here should not be misinterpreted to mean that such statements are the rule, or that they are adequate in scope. According to CEQ, only about 50 each statements were prepared in the 17 month period before November 1973. [Footnote omitted.] The failure to prepare program statements has not often been litigated, because of the uncertainty about their scope. However, SIPI, may mark the turning point in this trend." F. Anderson, *The National Environmental Policy Act,* in *Federal Environmental Law, supra,* note 16, at 335-338.[18]

[18]By way of discussion of this Court's recent decision in *Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulating Agency Procedures* (SCRAP), 422 U. S. 289 (1975), we attach as



As Anderson notes, ". . . the failure to prepare program statements has not often been litigated, because of the uncertainty about their scope." *Id.,* at 338. The problem is not an easy one, as this case indicates.[19] On the one hand a State bombarded with great numbers of individualized, site-specific statements which fail to assess their own cumulative impact is not particularly well served.[20] At worst, it is ad hocery proliferated.[21] Conversely, a statement so broad that in discussing generalities on a national scale, it may fail to address the cumulative impact within a given State or region.

It is not our purpose to try to define the precise scope of a program or of a region. That will depend upon the facts of a given case. But we do suggest that to leave the definition of that scope solely to the

Appendix A the "Memorandum to the Heads of Agencies," of November 26, 1975, of the Council on Environmental Quality. See especially the "Conclusions" of the Memorandum. We see no inconsistency between this Court's holding in SCRAP II and the decision of the Court below in this case. A question in this case is whether a proposal exists.

[19]See *No Oil, Inc. v. City of Los Angeles,* 13 C.3d 68, 77, n.5, 118 Cal. Rptr. 34, 39-40, n.5, 529 P.2d 66, 71-72, n.5 (Cal. S.C. 1974).

[20]This is not to say a site-specific EIS is not useful. It may well be exceedingly useful for exploring the effects of an action at a given site and alternatives to it. This is, however, something different from examination of the cumulative impact of many actions. See *Cady v. Morton,* 527 F.2d 786, 795 (9th Cir. 1975); *N.R.D.C. v. Morton,* 388 F. Supp. 829, 839-840 (D.D.C. 1974).

[21]The California Supreme Court has noted that the State's "little NEPA" requires that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Commission,* 13 C.3d 263, 283-284, 118 Cal. Rptr. 249, 263, 529 P.2d 1017, 1031 (Cal. S.C. 1975).

bureaucracy of the Federal Government will not necessarily serve the purposes of NEPA in any sort of decent fashion.[22] The temptation to gerrymander the scope along the lines of least resistance is always present. We do not propose any sort of court-mandated Federal regional planning, but we respectfully suggest that if the Federal Government is going to do somethings which will have the effect of massively altering the environment of the States, NEPA compels it to formulate some rational consideration of regional impacts. This will inform the States and the public, and they will be able effectively to participate in an informed manner in shaping the decisions which will affect them.

Further, a program environmental impact statement is a means of rationalizing and expediting procedures for applying NEPA. Once certain factors common to the program have been adequately analyzed, they need not be repeated and reexamined in each subsequent site-specific statement.

By way of informed and thoughtful resolution of the issue, we return to Anderson:

> "In view of the emphasis in NEPA's legislative history upon advance planning and prevention of decision making in destructive increments, it is no surprise that the legislative history also expressly states that 'regulations, policy statements, or expansion or revision of ongoing programs' must be covered by impact statements. The basic decisions made in the early phases of

[22]See *E.D.F. v. Coastside County Water District, supra*, 27 C.A. 3d 695, 704, 104 Cal. Rptr. 197, 202 (Cal. Ct. of App. 1972).



program design have a greater potential for environmental harm than separate project decisions at a later time. A 'program' 'umbrella,' or 'overview' impact statement consequently offers an occasion for consideration of basic policies, programmatic alternatives, geographic variations, cumulative impacts, and overall effects of large-scale programs or chains of proposed projects that cannot realistically take place in a statement on an individual action. Yet only about 50 such statements, largely on environmentally protective legislation, have been prepared.

"Many 'major federal actions' are likely to occur before a particular federal initiative is completed. A large archive of successive environmental analyses may accumulate if impact statements are prepared at each 'distinct and comprehensive' stage of an initiative, especially if impact statement preparation at the earliest possible opportunity becomes the rule. But rather than causing duplication and needless paperwork, these successive layers of statements can actually rationalize and simplify the § 102 process.

"Under this approach, the first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated. The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the broader statements for their treatment of far-ranging alternatives and basic federal policy.

"Numerous advantages could be obtained through this approach. It would establish a record

of least-cost, gradually circumscribed decision making without subjecting the agency to reconsideration of basic principles each time a specific action was contemplated. This view is shared by the CEQ, which has suggested that the agency should issue broad program statements, in addition to subsequent statements on major individual actions to cover localized environmental impacts.

"As this approach gained currency, it would primarily affect the requirements for statement adequacy. No rigid set of rules for statement preparation could be written; the adequacy of the statement would depend upon the 'action' analyzed. The courts would most likely welcome such a development and adjust standards of statement adequacy accordingly, as indicated in the *Scientists Institute* case. Many of the current problems of the agencies stem from court-imposed requirements that statements on specific programmatic initiatives must reach back in time to cover the larger policy questions that supposedly were resolved months or even years earlier. There is a punitive overtone to some of these decisions. Agencies that passed up an opportunity to comply during the earliest possible phases of decision making may have been required to prepare their statements as if the choices of an earlier point in time still existed.

"Judicial reaction to overlapping statement preparation would also be tempered by the wider trend that has fundamentally altered the expectations of reviewing courts. Impact statement preparation in rational 'tiers' closely tracks the expanding requirements for a better statement of the reasons behind administrative action, for a



preliminary survey of alternatives, and for designation of the administrative record back to the time of inception of the proposal." Anderson, *The National Environmental Policy Act,* in *Federal Environmental Law, supra,* note 16, at 418-419.

We suggest that the tiered approach suggested by Anderson provides a rational means of applying NEPA to actions ranging from the most general to the increasingly specific.

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## IV.

**APPROXIMATELY HALF THE STATES HAVE LAWS OR ADMINISTRATIVE REGULATIONS PATTERNED ON NEPA. THIS COURT'S CONSTRUCTION OF THE FEDERAL LAWS WILL AFFECT THE CONSTRUCTION OF THE STATE LAWS PATTERNED UPON IT.**

The decision of this Court on what is on its face an issue of Federal law will have severe ramifications for State law. Approximately half the States have followed the successful Federal example and have adopted laws or administrative regulations patterned in whole or in part on the National Environmental Policy Act. Both Federal and State Courts are apt to defer to Federal Court interpretations of NEPA in interpreting the State acts.

Twenty-six jurisdictions have now acted. Fourteen states and Puerto Rico have legislatively adopted little NEPAs of general application. California (Pub. Res. Code §21000 *et seq.*); Connecticut (Pub. Act. No. 73-

562, approved June 22, 1973); Hawaii (Haw. Rev. Stat. Ch. 334 (1974)); Indiana (§35-5301 *et seq.*); Maryland (Ch. 702, Md. Laws of 1973); Massachusetts (C. 30, §61 *et seq.*); Minnesota (Chap. 412, Laws of 1973); Montana (§69-6501 *et seq.*); New York (Art. 8, Environmental Conservation Law (1975)); North Carolina (Sess. Laws-1971, Chap. 1203); Puerto Rico (T. 12§1121 *et seq.*); South Dakota (S.D. Comp. Laws 1967 Ch. 11-1A (Supp. 1974)); Virginia (Chap. 384, approved March 15, 1973); Washington (§43.21C010 *et seq.*); and Wisconsin (Chap. 273, Laws of 1971). Five states have legislatively authorized little NEPAs of limited application. Delaware (7 §7001 *et seq.*); Georgia (Ga. Code Ann. Ch. 95-A-1, §241(e)(1)); Mississippi (§49-27-11(i), Coastal Wetlands Protection Law); Nevada (§704.820 *et seq.* Also see Nevada Air Quality Regulations, Article 13); North Dakota (§54-01-05, 4 N.D. Century Code). Six states have administratively promulgated NEPA equivalents. Arizona (Game and Fish Commission policy of July 2, 1971; Policy Memo, Requirements for Environmental Impact Statements, of June 9, 1971); Michigan (Executive Directive 1971-10, issued by Governor); Nebraska (Neb. Dept. of Roads, Department of Roads Action Plan (1973)); New Jersey (N.J. Exec. Order No. 53 (Oct. 15, 1973) and Administrative Order No. 23 (August 1, 1973)); Texas (Policy for the Environment Adopted January 1, 1973); and Utah (Executive Order, August 27, 1974). See: Yost, *NEPA's Progeny: State Environmental Policy Acts,* 3 Env. Law Rptr. 50090 (1973); Council



on Environmental Quality, *Environmental Quality* (Fifth Annual Report, 1974) 401-409, 421-426.

These States look to Federal Judicial interpretations of NEPA to construe their own acts. *Friends of Mammoth v. Mono County,* 8 Cal. 3d 247, 260-261, 104 Cal. Rptr. 761, 769-770, 502 P.2d 1049, 1057-1058 (Cal. S.C. 1972); *Eastlake Community Council v. Roanoke Assoc., Inc.,* 513 P.2d 36, 44-45 (Wash. S.C. 1973); *Wisconsin's Environmental Decade, Inc., v. Public Service Commission of Wisconsin,* 230 N.W. 2d 243, 248 (Wisc. S.C. 1975); *People of the State of California v. County of Kern,* 39 C.A.3d 830, 841, 115 Cal. Rptr. 67, 75 (Cal. Ct. of App. 1974); see *Secretary of Env. Aff. v. Massachusetts Port. Auth.,* 323 N.E.2d 329, 339 (Mass. S.J. Ct. 1975); *Minnesota Public Interest Research Group v. Minnesota Environmental Quality Council,* 237 N.W.2d 375, 380-381 (Minn. S.C. 1975); *City of Davis v. Coleman, supra,* 521 F.2d 661, 672 (9th Cir. 1975); also see Yost, *NEPA's Progeny: State Environmental Policy Acts, supra,* at 50095 (1973).

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## CONCLUSION

We respectfully request that this Court in its disposition of the issue of the program environmental impact statement under NEPA, bear in mind the enormous importance of both the law and the program statement as a means by which States may become informed about and participate effectively in making the decisions which the Federal Government makes

which may significantly affect the environment of the several States.

Respectfully submitted,

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Dated, April 8, 1976.

**(Appendix Follows)**

# APPENDIX

## Appendix

### Memorandum to the Heads of Agencies

As you may know, the Supreme Court, recently issued its first major decision interpreting the National Environmental Policy Act (NEPA), *Aberdeen and Rockfish Railroad Co., et al. v. Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, 422 U.S. 289 (June 25, 1975). Many agencies have questioned the Council on the meaning of the opinion and its probable impact on their procedures. In order to provide uniform and comprehensive guidance, the Council has prepared the enclosed explanatory memorandum on the case.

The Supreme Court addressed two issues in SCRAP: (1) whether the ICC violated NEPA by not holding a hearing on a second draft impact statement, prepared in connection with a general increase in railroad freight rates; and (2) whether the ICC's final EIS was deficient in not analyzing the environmental effects of the entire rate structure and in not extensively analyzing the impacts of a rate increase on recyclable scrap materials. The Court held that (1) oral hearings are not part of the ICC's "existing agency review process" and therefore no hearing was required on the second draft EIS, and (2) the narrow scope of the final EIS was appropriate in light of a broader, concurrent ICC investigation of the railroads' rate structure, and the opportunity for parties to challenge specific rate increases (e.g., on recyclables) in special proceedings.

SCRAP presented unique facts and a narrow decision. The ICC's three types of proceedings—a broad investigation of the entire rate structure, a concurrent review of the incremental rate increase, and the opportunity for parties to challenge specific increases—are not characteristic of most agencies. The Court relied on the breadth of the rate structure proceeding, and on the opportunity for detailed review of specific increases to conclude that the incremental increase was a limited federal action. Accordingly, the Court upheld a limited EIS.

Procedurally, the Court stated that final statements are due when a federal "proposal" exists. But the Court did not define what a "proposal" is or provide other guidance for identifying federal proposals.

In view of the ambiguity of the definition of "proposal" and the narrow facts of the case, the Council recommends no general change in agency NEPA procedures. Some agencies most likely need to alter their rulemaking procedures, however, to provide that final statements are prepared in time for the publication of proposed rules. Any agency which believes that rulemaking or any other changes may be necessary should consult the Council for a review of its particular situation.

I hope the Council's memorandum is helpful to you and your agency. I encourage your staff to contact the Council's staff directly on any particular questions concerning SCRAP and its effect in your agency's procedures.

RUSSELL W. PETERSON,
*Chairman.*



## MEMORANDUM CONCERNING ABERDEEN & ROCKFISH RAILROAD CO. VERSUS SCRAP

The United States Supreme Court's second opinion in *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (June 24, 1975) is the first major decision by a full Court construing the National Environmental Policy Act (NEPA). Because some agencies have informally raised questions concerning the possible impact of SCRAP on their NEPA procedures, the Council on Environmental Quality, pursuant to its responsibilities under the National Environmental Policy Act and under Executive Order 11514, provides the following guidance and advice.

### BACKGROUND

As the Supreme Court noted in its opinion, knowledge of the unique factual setting of SCRAP is necessary to understand the legal issues. The Court described the Interstate Commerce Commission's (ICC) administrative proceedings in the syllabus to its opinion:

> In December 1971, the Nation's railroads, citing sharply increasing costs and decreasing or negative profits, collectively proposed to file tariffs increasing their freight rates by a temporary surcharge across the board. The Interstate Commerce Commission (ICC) in the ensuing general revenue proceeding, finding that the railroads had a critical and immediate need for revenue, declined to exercise its power to suspend proposed rate increases, and the surcharge became

effective in February 1972. The railroads shortly filed for larger, selective rate increases, but in April 1972 the ICC suspended the effectiveness of these increases pending its investigation of their lawfulness, the ICC the previous month having served a brief draft environmental impact statement on all parties to the investigation, discussing the environmental consequences of rate increases with respect of recyclables in general terms and concluding that there was no basis yet to believe that the environment would be substantially affected thereby . . . [I]n October 1972, after an oral hearing, the ICC issued a final report declining to declare the selective rate increases unlawful, terminating the previously entered suspension order, canceling the surcharge that had been subsumed in the selective increases, and ordering a ceiling on rate increases with respect to some but not all recyclables. The report stated that having given extensive consideration to environmental factors,[1] the ICC would not file a separate, formal impact statement under the NEPA, and pointed out that the ICC had begun a separate investigation into the entire rate structure focusing on whether it interfered with the Government's environmental program. However, in November 1972, the ICC reopened its investigation into the lawfulness of selective

[1](CEQ note) In an unusual procedural sequence, the "final report" expressed the ICC finding that the actions would have no significant environmental effect, even though a "draft" had been filed. This finding eliminated all legal requirements for any draft or final impact statement up to that point in time if the finding was supportable. The report was a type known in practice as a "negative declaration" (statement that no significant impact will be created) and therefore was not a "final impact statement" as that term is generally used.



rate increases to reconsider the environmental effects of the new rates on recyclables, such rates being suspended for an additional period with the railroad's consent. In March 1973 the ICC served an expanded draft impact statement, concluding that its order of October 1972 had been correct, and finally terminating its investigation without declaring any of the proposed rates unlawful except as previously provided in the October 1972 order.

The NEPA issues before the Supreme Court concerned the lower court's conclusion that:

> . . . the ICC had failed to comply with NEPA in two respects. *First, no oral hearing had been held after circulation of the second draft statement of March 13, 1973, and before the preparation of the final impact statement.* . . . [The District Court] ruled that since the ICC held an oral hearing before adopting its October 4, 1972 report, such a hearing was therefore presumptively an "existing agency review process" and one should have been held before adopting the final environmental impact statement on May 1, 1973. Moreover, the ICC had simply reconsidered its October 4, 1972 decision in light of the impact statement, instead of starting all over again from the beginning. In order to start over again, it had to consider its impact statement at an oral hearing. *Second, the court concluded that the report did not give "good faith" consideration to environmental factors . . . . It held the statement deficient in two respects.* First, it held that the statement did not sufficiently analyze the underlying structure. . . . Second, the ICC should have more extensively explored the quan-

titative response of recycling businesses to freight rates. . . . (Slip opinion, pp. 11-12). (Emphasis added.)

Thus, the Supreme Court examined narrow issues both of scope of the ICC statements (EIS) and the procedure which the ICC followed.

### SCOPE OF THE EIS

This issue turned on a determination of the nature and scope of the "federal action" involved. The Supreme Court said that under relevant case law the primary issue before the ICC in general revenue cases is the financial need of the railroads. Challenges to specific rates on individual commodities (e.g., recyclables) should be left "primarily to more appropriate future proceedings." (*id.*, 29) The Court noted that challenges to *specific* increases would raise "the most serious environmental issues"; in contrast, the general revenue proceeding "raise[d] few environmental issues." (*id.*, 29). Moreover, the Court found it significant that "the ICC had begun an investigation of the underlying rate structure [in a different proceeding] . . . and had started devoting attention to environmental issues in that proceeding before the decision of the court below." (*id.*, 31) The Court saw no purpose in ordering the ICC "to thoroughly explore the question [of the underlying structure] in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding." (*id.*, 31)



For these reasons, the Court held that the "decision of the lower court . . . to deem the "federal action" involved . . . to include an implicit approval of the underlying rate structure was inaccurate." (*id.*, 31) Resolution of the case therefore became "easy"—the ICC's environmental impact statement was adequate in light of the narrowly limited nature and scope of its proposed action, and in light of the contemporaneous "more appropriate proceeding."

Substantively, this part of the decision stands for the common sense proposition that the nature and scope of required analysis is related to the nature and scope of the relevant action and its potential impact. In SCRAP, the statement was adequate only because the action and its impacts were extremely limited and because larger impacts were being analyzed in another, broader proceeding. The Court did not suggest that a limited EIS would suffice for a federal action which raised issues of greater environmental scope.

Thus, agencies should continue to tailor the scope of impact statements to the scope of proposed actions and their environmental impacts. Agencies which sponsor incremental actions with cumulative significant impacts (e.g., individual coal leases or highway segments) should continue the practice of preparing program statements covering the cumulative environmental effects of the broader programs, as prescribed in Sec. 1500.5 of CEQ's Guidelines. Similarly, they should continue to look at longer range impacts and decision options which might be preempted by their

proposed actions. CEQ will continue to assist agencies in defining the proper scope of project and program assessments and statements, consistent with the SCRAP opinion.

PROCEDURAL ISSUES

Concerning the procedural issues, the Supreme Court held that the lower court erred in two respects:

> . . . in deciding that the oral hearing which the ICC chose to hold prior to its October 4, 1972 order was an "existing agency review process" during which a final draft environmental statement (i.e., the one circulated in March, 1973) should have been available and . . . in deciding that the ICC should have "started over again" after it decided to prepare a formal impact statement. (*Id.*, 25-26)

In reaching this conclusion, the Court reviewed two aspects of the impact statement process:

> The draft and comment phase.
>
> The timing of the final statement.

The Court's discussion of these points follows (footnotes excluded):

> We agree with appellants that the District Court erred in deciding that the oral hearing which the ICC chose to hold prior to its October 4, 1972 order was an "existing agency review process" during which a final draft environmental impact statement (i.e., the one circulated in March, 1973) should have been available and that it also erred in deciding that the ICC should have "started over again" after it decided to prepare a formal impact statement.



> NEPA provides that "such statement . . . shall accompany *the proposal* through the existing agency review processes". This sentence does not, contrary to the District Court opinion, affect the time when the "statement" must be prepared. It simply says what must be done with the "statement" once it is prepared—it must accompany the "proposal." The "statement" referred to is the one required to be included "in every recommendation or report on proposals for . . . major federal actions significantly affecting the quality of the human environment" and is apparently the final impact statement, for no other kind of statement is mentioned in the statute. Under *this* sentence of the statute the time at which the agency must prepare the final "statement" is the time at which it makes a recommendation or report on a *proposal* for federal action. Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing. Here, however, until the October 4, 1972 report, the ICC had made no proposal, recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972—sometime after the oral hearing.

The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement" and CEQ guidelines provide that:

> To the fullest extent possible, all . . . hearings [on proposed agency action] shall include consideration of the environmental aspects of the proposed action . . . Agencies should make *any* draft environmental [impact] statements to be issued available to the public at least fifteen (15) days prior to the time of such hearings.
>
> Such consultation occurred here from the outset; environmental issues pervaded the hearings held—both oral and written; and all draft impact statements in existence were circulated before the hearings. *Procedurally* NEPA was thus thoroughly complied with through October 4, 1972. (*id.*, 25-27) (emphases in original)

Most of the questions which have been informally raised by agencies have concerned the possible implications of this portion of the opinion for (a) the need for a draft EIS and (b) the timing of preparation of the EIS.

### DRAFT STATEMENTS

The Supreme Court commented on NEPA's requirement that a statement accompany an agency proposal through the review process, and reinterpreted the legal basis for draft statements. In practice, however, the role of draft statements appears to be unchanged by the Court's decision.

The District Court had relied on the sentence, in the Act which requires that statements be used in agency review processes, to decide that the ICC violated NEPA by omitting a hearing on the ICC's second draft statement, when a hearing had been held earlier.



The Supreme Court said this reliance was misplaced. According to the Court, the Act's mandate that an EIS accompany a proposal through agency review does not determine *when* a draft EIS is to be prepared, but instead dictates *how* a statement is to be used after it is prepared:

> This sentence does not, contrary to the District Court opinion, affect the time when "the statement" must be prepared. It simply says what must be done with the "statement" once it is prepared. (*id.*, 26)

The process of preparing and circulating draft statements relates not to the agency review requirement, but to the consulting requirement in Sec. 102 (2)(C):

> The statute also requires that agencies consult with other environmentally expert agencies "prior to making any detailed statement": . . . such consultation occurred here from the outset: environmental issues pervaded the hearings held—both oral and written: and all draft impact statements in existence were circulated before the hearings. (*id.*, 27)

The Court found that the ICC had prepared and circulated a draft statement, received substantial comment, and thereby satisfied the consulting requirement. In sum, the Court (1) interpreted the draft and comment process as a practice which satisfies the consulting requirement rather than the agency review requirement, and (2) found that the ICC had prepared and circulated its own draft. In practice, the

draft and comment process remain unchanged from the description in the Council's Guidelines of August 1, 1973.

The source of agencies' questions to the Council about draft statements is a sentence in the opinion related to the timing of statements. The Court said:

> The "statement" [which must accompany a proposal through agency review] . . . is apparently the final impact statement, for no other kind of statement is mentioned in the statute. (*id.*, 26)

One might question whether the Court meant that draft statements are unnecessary under NEPA. Such an inference strains the opinion, however, for two reasons. First, the Court found the ICC *had* issued a draft EIS (on March 6, 1972, following the railroads' filing of their proposed rate increases on February 28, 1972). Thus, the question of the need for a draft EIS was not before the Court. Second, the quoted sentence appeared in the Court's discussion of timing, not its discussion of draft statements. Thus, any inference that draft statements are unnecessary would take the Court's statement out of context. A more reasonable conclusion is that the Court assumed a draft statement had been prepared, and that the need for a draft statement was therefore not an issue before the Court. The draft and comment process remains an integral part of building genuine environmental analysis into federal decision making, consistent with Congressional intent and ongoing practice.



### TIMING OF DRAFT AND FINAL STATEMENTS

The Court commented on the timing of statements, which it related to the timing and definition of "proposals." The definition of proposal is critically important in agencies' EIS scheduling, but the Court offered little guidance on its meaning. Because of the ambiguity in the opinion, the fact that the Court's statements in SCRAP are based on unique facts, and the possible interpretation of this portion of the opinion is dictum, the Council recommends no general changes in EIS timing or procedures at this time. If individual agencies believe that specific changes may be necessary for some of their actions, they should contact the Council's staff and review the need for any change.

The Court indicated that the timing of a final EIS is determined by the provision requiring that it be included in recommendations or reports "on proposals":

> Under *this* sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action. (*id.*, 26) (emphasis in original)

The Court discussed this conclusion in the context of two types of agency proceedings.

First, it said, "[w]here an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear

to require an impact statement to be included in the proposal and to be considered at the hearing." (*id.*, 26) This sentence may require a change in some agency procedures for actions initiated by formal publication of a proposal (e.g., publication of proposed regulations). The fact of publication does not necessarily equate with the existence of a "proposal," however, and the Court's opinion does not define what a "proposal" is. For example, the Bureau of Land Management publishes several formal notices in the course of selling leases for offshore drilling, including a call for nomination of tracts, preliminary designation of tracts and invitation for bids, and award of leases. The Supreme Court's opinion does not appear to overrule BLM's procedures, which designate the bid notice as the "proposal," because the decision does not provide standards for determining which of those published notices should be considered the "proposal" under NEPA. Moreover, the Court's sentence quoted above is not material to the holding in SCRAP, since the "proposal" in SCRAP was not initiated by the ICC. Accordingly, the Council believes that the most reliable guidance comes from the Council's Guidelines and from existing lower federal court decisions which better define the time when federal actions reach a stage of development sufficient for NEPA to apply. See, e.g., e CEQ Guidelines, Sec. 1500.6; *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079 (1973); and, more recently and distinguishing *SCRAP*, *No East-West Highway Committee, Inc. v. Whitaker*, No. 73-199 (D.N.H., Oct. 22, 1975).



The Supreme Court also discussed timing of final statements in fact situations such as those in SCRAP, where the agency not only acted exclusively in an adjudicative capacity, but also had no role in initiating federal action. The Court indicated that, in such cases a final statement need not be issued until the agency makes a proposal, recommendation, or report *of its own* (as opposed to consideration of a private party's proposal):

> Here . . . until the October 4, 1972 report, the ICC had made no proposal recommendation or report. The only proposal was the proposed new rates filed by the railroads. Thus, the earliest time at which the *statute* required a statement was the time of the ICC's report of October 4, 1972 . . . (*id.*, 26) (emphasis original)

It was unnecessary for the Court to develop this conclusion because the ICC had determined as of October 4 that the rate increases would *not* significantly affect the environment. (See also, note 1, p. 2 *supra*):

> Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement. ICC, *Ex Parte No. 281*, a 314 (Sept. 27, 1972). (See also, slip opinion, p. 7.)

The fact is that the Court did address this timing question, and said that final statements are due (at the latest) under the statute when agencies make their recommendations or reports on federal pro-

posals. Several other elements in the case illuminate this statement on timing.

First, according to the Court, the ICC's method of proceeding includes no major decision points between an applicant's filing and the Commission's decision. The Court apparently concluded that in ICC's general revenue proceedings, hearings are minor, discretionary events in the investigative process. This practice contrasts with other adjudicative agencies—such as the NRC and the FPC, for example— where proceedings include formal staff positions and hearing panels and/or formal reports by hearing panels or administrative law judges prior to a commission decision. These staff positions and hearing reports are probably "recommendation[s] or report[s] on . . . proposal[s] for federal action" under the SCRAP opinion.

Second, the Court found that "consultation occurred . . . from the outset; environmental issues pervaded the hearings held—both oral and written" (*id.*, 27) before the ICC's October 4th decision. Even though the ICC did not prepare a separate, formal EIS, the Court was apparently persuaded that the ICC had consulted heavily with outside parties in environmental issues, and had in fact integrated its environmental analysis into its decision making (*id.*, 26-28). Although the Court did not require a final EIS to be *issued* until the agency made its recommendation or report, the Court seemed convinced that an environmental analysis was *prepared* and *used* in the agency decision process.



Finally, this portion of the Court's decision does not affect the timing of any draft EIS that might be required. In this connection, it should be recalled that in support of its conclusion that the ICC had satisfied the consultation requirement, the Court noted that "all draft impact statements in existence were circulated *before* the hearings." (*id.*, 27) (emphasis added)

## CONCLUSIONS

SCRAP is a complex decision. It concerned a federal action uniquely limited in scope, and its applicability to other situations is not clear. It raises ambiguities concerning precisely which EIS procedures might be required by the statute alone, but does not negate responsibilities flowing from other authorities such as the Guidelines, nor does it appear to compel changes in effective ongoing practices.

In issuing guidance to agencies, the role of the Council is not and has never been merely to outline the bare minimum necessary for compliance. Such considerations are, of course, relevant to the preparation of the Guidelines; but the Council's determinations are based additionally on policy factors relating to the need to effectively implement NEPA, and Executive Order 11514.

Nothing in the Council's Guidelines is inconsistent with the holdings of SCRAP. Specifically, in terms of the procedural issues discussed above:

(1) Circulation of draft statements is the most effective way to achieve the required consultation. It provides commenting federal agencies, States and the

public with an identifiable opportunity to focus on a single, written, analysis of an agency proposal, and provides the author agency with a manageable, efficient device for obtaining detailed technical expertise, and value judgments of the commenting parties. The draft and comment process also provides an opportunity for careful internal analysis of a proposal, and yields an analysis document that can be critically important in agency decision making.

(2) The Court's comments on timing of final statements will most likely require changes in agency rulemaking practices, but not otherwise. The need to issue a final EIS upon publication of proposed rules is not mandated by the Court's holding, but publication of proposed rules is so clearly a federal "proposal" that the Council believes a case which presented this question would produce a decision requiring an EIS at the time of publication. The narrowness of the Court's holding, however, and the absence of guidance from the Court on what constitutes a proposal lead the Council to recommend no other general changes in agency NEPA procedures based on SCRAP.

Any agency which believes that changes in procedures may be necessary should consult the Council for a review of its particular situation.

1975 National Environmental Policy Act Oversight Hearings, House Merchant Marine and Fisheries Committee, 94-14, p. 246 *et seq.* 1975).